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ARIZONA SUPREME COURT

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| In the matter of: |) | |
| |) | |
| PETITION TO ADD NEW RULE 47.3 |) | |
| CONCERNING CHILD REMOVAL |) | Supreme Court No. _____ |
| TO THE RULES OF PROCEDURE |) | (Emergency or Expedited |
| FOR THE JUVENILE COURT |) | Adoption Requested) |
| _____ |) | |

Pursuant to Arizona Supreme Court Rule 28, David K. Byers, Director, Administrative Office of the Courts, Arizona Supreme Court, respectfully petitions this court to adopt the attached proposed new Rule 47.3 of the Rules of Procedure for the Juvenile Court.

I. Background and Purpose of the Proposed Rule Amendments and New Rules

The proposed new rule is needed to implement an amendment to A.R.S. § 8-821(A) by Laws 2017, Chapter 282. Sec. 3 which provides:

The juvenile court on a DEPENDENCY petition by an interested person, a peace officer, A CHILD WELFARE INVESTIGATOR or a child safety worker under oath OR ON A SWORN STATEMENT OR TESTIMONY BY A PEACE OFFICER, A CHILD WELFARE INVESTIGATOR, OR A CHILD SAFETY WORKER MAY ISSUE AN ORDER THAT

AUTHORIZES THE DEPARTMENT TO TAKE TEMPORARY CUSTODY OF A CHILD...

The amended language clearly provides for the court to issue a **pre-petition** order that authorizes the department to take temporary custody of a child. The Department has authority based on the criteria stated in A.R.S. § 8-821 (B) to take custody of a child pre-petition without a court order. While subsection B provides additional criteria that must be met, the statute does not expressly delineate when the department must seek court authorization to take temporary custody of a child rather than taking temporary custody on its own authority. Instead, federal appellate case law provides direction regarding this issue that is quite similar to the direction provided to law enforcement officers searching for evidence of crimes. This direction is based on the U.S. Constitution's 4th Amendment requirement to obtain court authorization unless "exigent circumstances" exist that require temporary custody to protect a child before court authorization can be obtained.¹

(T)he Fourth Amendment safeguards children's "right ... to be secure in their persons ... against unreasonable ... seizures" without a warrant, U.S. Const. amend. IV, although we similarly recognize an exception to the warrant requirement where the exigencies of the situation are so compelling that a warrantless seizure is objectively reasonable under the Fourth Amendment...²

Whether exigent circumstances exist under the 4th Amendment often requires case by case fact specific consideration of the totality of the circumstances rather

¹ Kirkpatrick v. County of Washoe, 843 F.3d 784, 790 (9th Cir. 2016)

² Id at 789

than a rule or set of rules that apply in all circumstances.³ Consequently, the proposed rule provides a due process and 4th Amendment compliant procedure for the Department to obtain a court order authorizing temporary custody but does not address when this procedure must be used.

II. Section by Section Discussion of Proposed New Rule 47.3

A. Purpose

This subsection states the purpose of the proposed rule as follows: “On application under oath by a child safety worker, a child welfare investigator, or a peace officer, the court will determine ex parte whether to authorize the applicant to enter premises to locate a child and to take emergency temporary custody of the child.”

B. Burden of Proof

This subsection states the applicant’s burden to meet the 4th amendment requirement for probable cause, the A.R.S. § 8-821(A) requirement for a determination that temporary custody is “clearly necessary to protect the child from suffering abuse or neglect,” and the federal IV-E requirement that remaining at home is contrary to the child’s welfare. The additional criteria for temporary custody required by the Indian Child Welfare Act regulations are stated.

³ Missouri v. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)

C. Procedure

1. Application

This subsection identifies the persons eligible to apply for a court order that authorizes a search for a child and temporary custody of the child and provides for the Presiding Judge of Maricopa County to designate a judicial officer to receive and respond to the application due to 24/7 staffing and statewide coverage that can be provided by that court. It specifies the contents of the application including the description of the child, the location to be searched,⁴ whether authority is needed to execute the order between ten p.m. and six-thirty a.m.,⁵ the specific danger from which the child cannot be protected without temporary custody,⁶ and the availability of voluntary options that will remove the danger.⁷ Additional information is required under federal law when there is reason to know a child is an Indian child. The application is required to be submitted under oath.⁸

⁴ See A.R.S. § 13-3913, §13-3915(C)

⁵ See A.R.S. § 13-3917

⁶ See A.R.S. § 13-3914(B)

⁷ Wallis v. Spencer, 202 F.3d 1126, 1140-1141

⁸ See A.R.S. § 13-3914(C)

2. Form

The Administrative Director is authorized to approve the format in which the application is submitted. The current plan is to adapt a web interface that is currently used by the Superior Court in Maricopa County for warrant request from law enforcement officers statewide for use to communicate the application and order between the applicant and the judicial officer as required by the proposed rule. Paper forms and oral communication are provided to be available as backup.

3. Evidence

Reliance on reliable hearsay is authorized consistent with Rule 51(C)(1) concerning a temporary custody hearing.

4. Consideration

The proposed coverage by judicial officers is 24/7 with capability to respond to applications under the proposed rule when they are submitted. Consideration of the application would be ex parte with the option to request additional information from the applicant.

D. Findings and Order

1. Content

The order must state whether the applicant has met the burden of proof and include other content required by A.R.S. § 13-3915 for a warrant. This

subsection is also consistent with the requirement of the 4th Amendment of the U.S. Constitution that a warrant particularly describe the place to be searched and the persons or things to be seized. If requested, the order would state whether it includes authorization that the order be executed with the participation of law enforcement officers and outside normal hours for execution of a search warrant. For an Indian child the order must make an additional determination required by federal law. A separate warrant is required for each location required to be searched in order to locate the child.

2. Form

The web interface proposed to implement this proposed rule allows the application to be made and the order to be provided without the applicant and judicial officer being in each other's presence. Both will sign electronically. This subsection also permits the use of other remote alternatives as are authorized for warrants as a backup for the web interface.⁹

⁹ A.R.S. § 13-3915(D) & (E)

3. Notice

This subsection requires that the applicant provide the parent the application and order that grants temporary custody when custody of the child is taken as is required for the temporary custody notice (TCN).¹⁰

4. Execution and Duration

This subsection provides that the temporary custody authorized under this rule continues “until there is a material change in the factual basis for the probable cause determination” as required by 4th Amendment law¹¹ and for a maximum of ten days. When the order is executed the applicant must provide notice to the issuing court. Temporary custody obtained under the order expires unless a dependency petition is filed within the period stated as prescribed by statute.¹² Continuation of temporary custody is then reviewed at the Preliminary Protective Hearing.

5. Filing

This subsection requires that the application and order be filed in the court that would have jurisdiction over a dependency involving the child who is the subject of the application and order. After noting on the order whether the child was taken into temporary custody the applicant would file these

¹⁰ A.R.S. § 8-823

¹¹ U.S. v. Garcia, 707 F.3d 1190, 1195-1196

¹² A.R.S. § 8-821(F)

documents either with the dependency petition or within 72 hours of issuance.

III. Pre-Petition Distribution and Comment

The proposed rules were circulated for pre-petition comments to the attendees of a 2017 Judicial Conference session on this subject, the Committee on Juvenile Courts, the Department of Child Safety, Attorney General staff who handle dependency matters, and the Court Improvement Program Advisory Committee which includes a broad range of stakeholders in dependency matters. Changes were made to the draft rules based on some of these comments.

IV. Expedited Consideration of the Proposed New Rule

Petitioner requests that the Court consider this petition on an emergency basis due to the July 1, 2018 statutory effective date. Petitioner suggests distribution for comment until October 27, 2017 to enable the Court to consider this matter for adoption at its December, 2017 rules agenda. If adopted this will allow judicial and Department of Child Safety training concerning this rule in early 2018 prior to a July 1 effective date for the rule that coincides with the effective date of the statute.

Respectfully submitted this 5th day of September, 2017.

By /S/
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Appendix A

Rule 47.3 Court Authorized Removal

A. Purpose. On application under oath by a child safety worker, a child welfare investigator, or a peace officer, the court will determine ex parte whether to authorize the applicant to enter premises to locate a child and to take emergency temporary custody of the child.

B. Burden of Proof. The applicant shall have the burden of stating explicit facts that provide probable cause to believe:

1. emergency temporary custody of the child is clearly necessary to protect the child from suffering abuse or neglect;
2. no alternative means to effectively protect the child is available; and
3. remaining in the child's current home is contrary to the welfare of the child.

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the facts stated must provide probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child.

C. Procedure.

1. **Application.** A child safety worker, a child welfare investigator, or a peace officer may apply for authorization to enter premises to locate a child and to take emergency temporary custody of the child by submitting an application in writing or by recorded oral statement under oath to one of the judicial officers designated by the presiding judge of the superior court in Maricopa County to receive and respond to applications under this rule. The application or recorded oral statement must state:

- (a) the professional qualifications of the applicant,
- (b) the particular reasons each child is presently or imminently in danger of abuse or neglect,
- (c) a detailed account of circumstances that require emergency temporary custody including the facts that support the reasons given,
- (d) the availability of remedial services or other voluntary options that would remove or control the danger,
- (e) the identity and description of each child to be placed in emergency temporary custody,

- (f) the place or places to be searched,
- (g) any time by which custody must be taken,
- (h) reason for any authorization needed to execute the order between ten p.m. and six-thirty a.m., and
- (i) whether law enforcement assistance is requested.

Additionally, under 25 C.F.R. § 23.113(d), if there is reason to know the child is an Indian child, the applicant should provide any available information regarding the child's tribal affiliation, whether the child resides on a reservation and any efforts to contact a tribe. The other information that should be provided under 25 C.F.R. § 23.113(d) may be provided in the dependency petition.

2. **Form.** The application must be submitted in a format approved by the Administrative Director of the Supreme Court.

3. **Evidence.** Evidence presented in support of an application for emergency temporary custody may include evidence which is reliable hearsay, in whole or in part.

4. **Consideration.** As soon as possible after receipt of an oral statement or a written application, a designated judicial officer will consider the application ex parte. The judicial officer may question the applicant and any witnesses orally or in writing. Any oral questioning must be recorded.

D. Findings and Order.

1. **Content.** The order will state whether there is probable cause to believe that emergency temporary custody of the child is clearly necessary to prevent abuse or neglect because no alternative means to effectively protect the child is available and whether remaining in the child's current home is contrary to the welfare of the child. Additionally, an order granting an application must include:

- (a) a factual basis for the determination for each child,
- (b) the identity and description with reasonable particularity of each child to be placed in emergency temporary custody,
- (c) the description of one location to be searched for each order,
- (d) whether law enforcement is authorized to assist, and

(e) whether for good cause shown the authorization includes searching for the child and taking custody at any hour.

Additionally, for an Indian child, under 25 C.F.R. § 23.113(b)(1) the court must find probable cause that emergency temporary custody is necessary to prevent imminent physical damage or harm to the child. A separate order must be issued for each location to be searched.

2. Form. If the applicant and judicial officer are not in each other's physical presence, the judge may sign the order authorizing emergency temporary custody using an electronic signature to serve as the original order, orally authorize the applicant to sign the judge's name on the order, or sign an electronically transmitted version of the original order which is then deemed to be the original. The judicial officer will record the time and date of issuance of an orally authorized order on the original order and the applicant will send the duplicate original order to the judicial officer who issued the order who will then file these orders in the court that would have dependency jurisdiction of the child.

3. Notice. The applicant must provide the parent or other custodian a copy of the emergency temporary custody application and order authorizing emergency temporary custody with the Temporary Custody Notice (TCN) upon taking custody of the child or, when a parent is not present, as soon thereafter as possible.

4. Execution and Duration. The applicant may execute the order until there is a material change in the factual basis for the probable cause determination and within ten calendar days of issuance of the order. The applicant must provide notice of the execution of the order to the court that issued the order. The temporary custody authorized by the order will expire after 72 hours excluding Saturdays, Sundays and holidays unless a dependency petition is filed. The court with dependency jurisdiction over the child will review continuation of temporary custody as provided in rules 50 and 51.

5. Filing: The applicant must file the application and order when the TCN and the dependency petition are filed. Prior to filing the application and order the applicant must indicate on the order whether the child was removed as authorized by the order. If no petition is filed following an order authorizing emergency temporary custody under this rule the applicant must file the application and order within 72 hours excluding Saturdays, Sundays and holidays in the court that would have dependency jurisdiction of the child.